UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

PULAU CORPORATION **Employer** **and** **DISTRICT LODGE 77, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO** **Petitioner**	**Case 18-RC-272838**

DECISION AND DIRECTION OF ELECTION

On February 16, 2021, District Lodge 77, International Association of Machinists and Aerospace Workers, AFL-CIO ("Petitioner") filed the original petition in this case with the National Labor Relations Board ("Board") under Section 9(c) of the National Labor Relations Act ("Act"). By this petition, Petitioner seeks to represent certain employees employed by PULAU Corporation ("Employer") and working out of Camp Ripley in Morrison County, Minnesota,[1] where the Employer provides support services to the United States Army National Guard. There are two employees in the stipulated bargaining unit.

While the Employer contends in its statement of position that the instant petition was barred by the Board-conducted election in Case 18-RC-257776, it failed to timely serve its statement of position on Petitioner pursuant to Section 102.66(d) of the Board's Rules and Regulations. As a result, the Employer was precluded from litigating the election-bar issue.[2]

Nevertheless, and as set forth in greater detail below, the Act requires me to decide the threshold issue of whether this petition is barred under Section 9(c)(3) of the Act before directing an election therein.

Accordingly, a videoconference hearing was held on March 9, 2021, before a hearing officer of the National Labor Relations Board. The parties were permitted to state their positions and filed post-hearing briefs. Having considered the record evidence and relevant Board law, I find that there is no bar to an election under the instant petition.

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[1] The parties stipulated that the following is an appropriate unit for collective bargaining:

> Included: All full-time and regular part-time training support specialists, warehouse specialists, and TADSS Schedulers employed at the Employer's 15000 Hwy. 115 Camp Ripley Bldg. 10-65, Little Falls, Minnesota work location.
>
> Excluded: All other employees, office clerical employees, professional employees, and guards and supervisors as defined by the Act, as amended.

[2] As discussed more fully below, in order to prevent delaying these proceedings, I allowed the Employer to present witness testimony regarding its status as a successor employer.

Accordingly, I am directing a mail-ballot election in this matter as set forth in detail below.

I. PRECLUSION AND THE STATE OF THE RECORD

Pursuant to the Board's Rules and Regulations, Section 102.63(b), the Employer filed a statement of position with the Region prior to the deadline of 12:00 noon CT[3] on March 1, 2021, in which it contends that the instant petition is barred under Section 9(c)(3) of the Act by the election in Case 18-RC-257776 held on May 18, 2020. However, the Employer failed to timely serve its statement of position on Petitioner before the deadline, as required. On March 2, 2021, the Employer was notified of its failure and, at about 1:50 p.m., served the statement of position on Petitioner—25 hours 50 minutes late. The Employer did not request an extension of the deadline for the statement of position.

Section 102.66(d) of the Board's Rules and Regulations precludes a party from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue where the party fails to raise the issue in a *timely* statement of position, except evidence relevant to the Board's jurisdiction may always be presented. Under Section 102.66(d), the Employer's arguments should have been precluded and its statement of position rejected.[4] See *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017) (adopting Regional Director's decision to reject employer's statement of position and preclude litigation of issues raised therein based solely on the employer's failure to timely serve its statement of position on the petitioner); *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016) (overturning Regional Director's decision to accept statement of position that was timely filed, but served 3 hours and 20 minutes late, and allow union to litigate issues raised therein).

"The Act, however, does not permit circumvention of the election bar rule contained in Section 9(c)(3)." *E Center, Yuba Sutter Head Start*, 337 NLRB 983, 983 (2002). As such, I exercised my discretion under Section 102.66(b) of the Board's Rules and Regulations[5] and

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[3] All times are in Central Time.

[4] The Employer argues preclusion does not apply to statements of position timely filed with a Regional Director regardless of when they were served on the other parties. This contention is without merit. See *Twin City Foods*, 19-RC-265696 (January 19, 2021) (unpublished) (denying review of Regional Director's decision to preclude employer's litigation of issues raised in statement of position timely filed with Regional Director but served 1 hour 19 minutes late on union).

[5] See also *Brunswick Bowling*, 364 NLRB No. 96, slip op. at 3:

> The statement-of-position requirement that the preclusion provision enforces and the hearing that it affects are only parts of the larger representation proceeding, which has historically been investigative in nature. The amendments to the Board's Rules did not change this. Once a petition is filed, the regional director is charged with the responsibility to investigate the petition and ultimately to determine whether a question concerning representation exists. These are the regional director's statutory responsibilities under Section 3(b) of the Act; the amended rules did not—and could not—change them.

directed the hearing officer to receive evidence regarding the election-bar rule, including the Employer's statement of position and post-hearing brief.[6]

II. THE STATUTORY ELECTION BAR

A. Statement of Facts

On March 10, 2020, in Case 18-RC-257776,[7] Petitioner filed a petition seeking to represent training support specialists, warehouse specialists, and TADSS Schedulers employed by military defense contractor OT Training Solutions, LLC ("OTTS") and working in Building 10-65 at Camp Ripley, Minnesota.[8] Camp Ripley is a training center for military and civilian agencies and a primary training facility for Minnesota National Guard units,[9] and OTTS is a military defense contractor that provides training support and services.

I approved a stipulated election agreement between OTTS and Petitioner for a manual election on March 31, 2020; however, on March 19, 2020, the Board suspended all elections through April 2, 2020. I then approved an agreement to change the method of election to mail balloting. The election was held from April 27 to May 11, 2020, and the ballots were counted on May 18, 2020. The tally of ballots indicated all three eligible voters cast ballots in favor of Petitioner and a certification of representative issued on May 26, 2020.

Subsequent to the certification in Case 18-RC-257776, the United States Government opened a recompete bid for the support and services provided by OTTS. The Employer won the recompete bid and assumed the contract on September 30, 2020.

The Employer required the three former employees of OTTS to fill out employment applications and offered all three jobs with the Employer, of which two accepted. One continued working as a training support specialist, the other took a supervisory position. The Employer also hired a second training support specialist, who was not a former employee of OTTS. The record does not disclose whether the terms and conditions of employment changed from OTTS to the Employer.

The instant petition was filed on February 26.

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[6] The hearing officer allowed the Employer to call and question one witness, who was cross-examined by Petitioner. While the better course may have been for the hearing officer to call and question the witness, I find that this was at most harmless error and would have resulted in the inefficient use of Board resources and unnecessarily delayed these proceedings, as no subpoenas had been issued.

[7] I take administrative notice of the record in Case 18-RC-257776, including the petition, stipulated election agreement, parties' agreement to modify the stipulated election agreement, tally of ballots, and certification of representative.

[8] I note the petition and the certification of representative in Case 18-RC-257776 both incorrectly list 1500 Highway 15 as the address for Camp Ripley and, in the instant case, the Employer's Program Manager for its Army National Guard Contract misstated the address as 1500 Highway 150. The correct address, as stipulated by the Employer and Petitioner, is 15000 Highway 115.

[9] "Camp Ripley Training Center." Minnesota National Guard. https://minnesotanationalguard.ng.mil/crtc/ (accessed March 18, 2021).

B. The Act and Board Law

Section 9(c)(3) of the Act was added in 1947 and provides: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

For years prior to the passage of the Taft-Hartley Act in 1947, and specifically Section 9(c)(3) as set forth above, the Board barred petitions for an election for generally one year after the certification of a bargaining representative. *Hydraulic Press Brick Co.*, 47 NLRB 286, 288 (1943) ("As a general rule, the Board will not proceed with an investigation as to representation where there exists a valid certification less than a year old, of an active labor organization of clearly established identity"); *Kimberly-Clark Corp.*, 61 NLRB 90 (1945). The Board did not, however, bar election petitions filed within a year of an election at which no bargaining representative had been certified, which resulted in multiple Board-conducted elections in the same unit where unions were not selected. For example, in *Miami Shipbuilding Corp.*, 59 NLRB 1101 (1944), the Board conducted four elections in a single bargaining unit in just under 18 months. A mere 17 days after the unit employees initially voted for no representation, the Board directed a second election, which the petitioning union again lost. The Board directed a third election nine months later and, again, the petitioning union proved unsuccessful. The Board directed a fourth election only eight months thereafter. It was this short spacing of elections that Congress sought to address with the enactment of Section 9(c)(3). "Congress was mindful that, once employees had chosen a union, they could not vote to revoke its authority and refrain from union activities, while if they voted against having a union in the first place, the union could begin at once to agitate for a new election." *Brooks v. NLRB*, 348 U.S. 96, 100 (1954).

After the passage of the Taft-Hartley Act and the addition of Section 9(c)(3), the Board continued to apply the one-year certification bar. In *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507 (1952), the Board explained:

> It is a basic principle in Board law that, as stated by the Supreme Court, "... a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." A Board certification has thus been held to identify the statutory bargaining agent with certainty and finality, free from challenge as to its majority status, for a period of one year, absent unusual circumstances.

Id. at 1507-1508 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)).

It is well-established that the statutory election bar runs from the date of balloting, not the date of the certification of results. *Mallinckrodt Chemical Works*, 84 NLRB 291, 292 (1949) (rejecting the contention that the election bar runs from the date of the Board's final determination of the results of an election, and holding that the "more reasonable construction" of Section 9(c)(3) is that the bar runs from the date of balloting); *Kolcast Industries, Inc.*, 117 NLRB 418 (1957); *Retail Store Employees' Union, Local No. 692*, 134 NLRB 686, 688 fn. 5 (1961) ("Under the long-established interpretation of Section 9(c)(3), the Board holds that the 'twelve-month' limitation runs from the date of balloting and not from the date of certification of

results *where no union was selected as bargaining representative*" [emphasis in original]). The Board does not consider the election "held" until balloting has been completed. *Alaska Salmon Industry, Inc.*, 90 NLRB 168, 170 (1950). In a mail-ballot election, balloting is not completed until the votes have been tallied since ballots received after the due date but before the ballot count should be counted. *Watkins Construction Co., Inc.*, 332 NLRB 828 (2000); see also *American Driver Service, Inc.*, 300 NLRB 754 (1990) (finding "mail-ballot election concluded with a ballot count" on Monday even though ballots were due on the preceding Friday).

The Board will dismiss petitions filed more than 60 days before the end of the 12-month statutory period. *Vickers, Inc.*, 124 NLRB 1051, 1052 (1959).

C. Application of the Act and Board Law to the Instant Case

In the instant case, under Section 9(c)(3) of the Act, an election in the *same unit* as Case 18-RC-257776 cannot be held until May 19, 2021.

The Employer argues that the statutory election bar attaches to the unit and not the employer of the employees, citing to *Kraco Industries*, 39 LRRM 126 (February 20, 1957);[10] however, the Employer misreads *Kraco*.

In *Kraco*, the Board held that Section 9(c)(3) of the Act barred a petition filed 10 weeks after a "substantial number" of the same employees had previously voted against representation by the same union when they worked for a predecessor employer. The Board specifically noted:

> The employer is a successor to the business. The predecessor company made white sidewalls for tires the employer continues to make white sidewalls and continues the same wages, hours, and other working conditions. All employees were transferred to the employer's payroll *without* executing new employment applications, the same person remained as general manager, and the same foremen were retained. [Emphasis added.]

Ibid. At the heart of *Kraco* is the employer's status as, what the Board would come to call, a "perfectly clear" successor. See *Spruce Up Corp.*, 209 NLRB 194, 195 (1974) (quoting *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 294-295 (1972)). In any successorship situation under *Burns*, where the employer retains a majority of its predecessor's employees, the bargaining relationship continues and the employer and union negotiate unit employees' terms and conditions of employment; however, with a perfectly-clear successor, the employer forfeits its ability to bargain new terms and conditions. Id. Contrary to the Employer's argument, *Kraco* does not stand for the premise that Section 9(c)(3) of the Act prohibits an election by employees of a non-*Burns* successor. Rather, it preserves the lack of bargaining relationship in a perfectly-clear successorship, where the employment relationship remains unaltered at every level other than the name of the employer, in the same way that the bargaining relationship would have persevered had the predecessor employees voted in favor of representation.

[10] At the time of this decision, *Kraco Industries* is not currently available through electronic services such as Westlaw, LexisNexis, and Bloomberg BNA (Bureau of National Affairs).

Moreover, the *Kraco* decision is easily distinguishable from the instant case. Importantly, the employees in *Kraco* voted against representation and the company. As discussed, Section 9(c)(3) of the Act was added for this particular purpose, see *Brooks*, above; the Board already had a well-established certification bar for when a union won an election. Here, on the other hand, OTTS's employees voted in favor of representation, creating a bargaining relationship between OTTS and Petitioner. The Employer assumed OTTS's service contract but did not purchase any of its assets or retain a majority of the OTTS employees. Had it done so the bargaining relationship would have continued with the Employer and Petitioner under the Board's successor-bar doctrine.[11]

Section 9(c)(3) of the Act, however, does not prohibit an election in the current situation for the simple reason that the bargaining unit is not the same. When the Employer hired new employees, which resulted in less than a majority of its employees being from the predecessor, the bargaining relationship ended, as the unit ceased to exist. For this same reason, the certification-year bar ended and no election-year bar exists. To find differently would encourage conduct contrary to the Act and undercut employee rights; for, any company could avoid unionization for nearly 12 months by failing to hire a majority of employees who had recently selected representation in a Board-conducted election.[12]

III. CONCLUSION

Based on the record, it is concluded that the evidence is insufficient to establish any bar to an election pursuant to the petition in this case.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on the record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it would effectuate the purposes of the Act to assert jurisdiction herein.[13]

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[11] As the Supreme Court noted, "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros.*, 321 U.S. at 705. All of the Board-established election bars—successor, recognition, and certification—operate in furtherance of this purpose to allow a period of time for newly established bargaining relationship to stabilize. Section 9(c)(3) of the Act functions to prevent the instability caused by multiple elections in a short timespan where employees choose no representation.

[12] While the Employer states it is not aware of any Board case where the Board "held that the election bar does not apply to an employer taking over the operations of a previous employer that is not deemed to be a labor law 'successor' within the relevant legal meaning of that term," neither does it cite to any Board cases where the Board applied the statutory election bar to non-successor employers in a similarly described unit nor does it point to any case other than *Kraco* where the appropriate bargaining unit has not been defined as employees of a particular employer. Other cases cited by the Employer stand only for the premise that Section 9(c)(3) of the Act prohibits an election for 12 months and do not involve successor employers. As such, they need not be addressed.

[13] The parties stipulated that PULAU Corporation, a Florida corporation with a place of business located in Little Falls, Minnesota, is a military defense contractor which provides training services to the United States Government.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. There is no collective-bargaining agreement in effect covering any of the individuals in the petitioned-for unit and, therefore, no contract exists barring consideration of the instant petition.

6. The parties have stipulated, and I find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time training support specialists, warehouse specialists, and TADSS Schedulers employed at the Employer's 15000 Highway 115, Camp Ripley, Building 10-65, Little Falls, Minnesota work location.

Excluded: All other employees, office clerical employees, professional employees, and guards and supervisors as defined by the Act, as amended.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by District Lodge 77, International Association of Machinists and Aerospace Workers, AFL-CIO.

I. METHOD OF ELECTION

On November 9, 2020, the Board reiterated its longstanding preference for manual elections under *San Diego Gas & Electric*, 325 NLRB 1143 (1998), while also providing more specific and defined parameters under which Regional Directors should exercise their discretion in determining the method of election against the backdrop of COVID-19. The Board set forth "six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic," noting that "[w]hen one or more of these situations is present, a Regional Director should consider directing a mail-ballot election" under the extraordinary circumstances presented by the COVID-19 pandemic. *Aspirus Keweenau*, 370 NLRB No. 45, slip op. at 1. Those six situations are:

1) The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2) Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;

In the past calendar year, a representative period, the Employer, in the course and conduct of its business operations, provided services valued in excess of $50,000 directly to customers located outside the State of Minnesota.

3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols;[14]
5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and
6) Other similarly compelling considerations.

As discussed below, the 14-day positivity rate in Morrison County, where the Employer's facility is located, is 5% or higher and warrants a mail-ballot election. This finding is further supported by other similarly compelling circumstances.

A. Facts Related to the Six Situations

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status

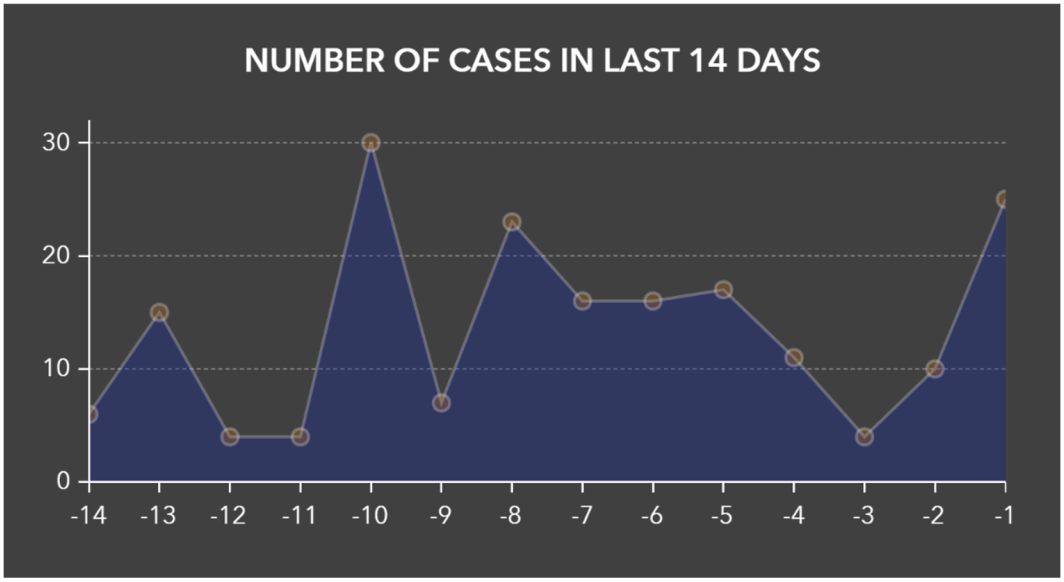
As the Board in *Aspirus* acknowledged, all regional offices (including subregional and resident offices) have been on permissive, rather than mandatory, telework since mid-June 2020.

2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher

The *Aspirus* Board did not specifically detail how the 14-day trend in the number of new cases should be evaluated, but it did direct that "the 14-day period should be measured from the date of the Regional Director's determination, or as close to that date as available data allow" and that county-level data for the potential polling place should be accessed through the "Coronavirus Resource Center" website maintained by Johns Hopkins University. 370 NLRB slip op. at 5, fn. 20 & 22. Camp Ripley, where the Employer proposed holding an in-person election, is located in Morrison County, Minnesota. As of 2:01 a.m. on March 19, 2021, the Johns Hopkins site for Morrison County showed the following 14-day trend:[15]

[14] "Suggested Manual Election Protocols," General Counsel Memorandum 20-10 ("GC Memo 20-10") (July 6, 2020). See also, "Guidance on Propriety of Mail Ballot Elections, pursuant to *Aspirus Keweenaw*," General Counsel Memorandum 21-01 (November 10, 2020) ("Aside from elements set forth in GC Memo 20-10, upon which the *Aspirus Keweenaw* Board relies in part, the instructions set forth in this memorandum supersede all other instructions on the subject").

[15] "COVID-19 Status Report" (updated March 19, 2021). Johns Hopkins University. https://bao.arcgis.com/covid-19/jhu/county/27097.html (accessed March 19, 2021).



The Johns Hopkins data indicate the 14-day trend in the number of new confirmed cases has fluctuated from six on March 5, 2021, to 25 on March 18, 2021, with a daily high within that range of 30 on March 9, 2021. Data from the Minnesota Department of Health describe a similar fluctuation.[16] There is certainly no downward trend.

Regarding the 14-day positivity rate, Johns Hopkins explains the World Health Organization ("WHO") standard cited in *Aspirus*: "On May 12, 2020 the World Health Organization (WHO) advised governments that before reopening, rates of positivity in testing (i.e., out of all tests conducted, how many came back positive for COVID-19) should remain at 5% or lower *for at least 14 days*" (emphasis added).[17] In other words, the WHO standard is not an average, and a locality with a testing positivity rate over 5% in any one of the preceding 14 days normally warrants a mail-ballot election.

Since July 2020, the Minnesota Department of Health has issued a "Weekly COVID-19 Report" each Thursday at 11:00 a.m., which includes a "Weekly Percent of Tests Positive by County of Residence." As of March 18, 2021, the Morrison County positivity rate for the most recent week reported, February 28 to March 6, 2021, was "5% to <7%."[18] I find the positivity

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[16] "Morrison COVID-19 Dashboard" (updated March 18, 2021). Minnesota Department of Health. https://experience.arcgis.com/experience/35e5a51f652d477992101d1ce698054a (accessed March 19, 2021).

[17] "Which U.S. States Meet WHO Recommended Testing Criteria?" https://coronavirus.jhu.edu/testing/testing-positivity (accessed March 19, 2021).

[18] "Weekly COVID-19 Report" (updated March 18, 2021), p. 8. Minnesota Department of Health. https://www.health.state.mn.us/diseases/coronavirus/stats/covidweekly10.pdf (accessed March 19, 2021). The Employer's post-hearing brief, filed on March 18, 2021, also identifies a 14-day average test positivity rate of 6% in Morrison County, as reported by *The New York Times*. https://www.nytimes.com/interactive/2021/us/morrison-minnesota-covid-cases.html (accessed March 19, 2021). The Employer provides no data regarding COVID-19 at Camp Ripley (e.g., confirmed cases, positive tests, etc.), and its assertion of a likely lower positivity rate is pure speculation.

rate in Morrison County is above the 5% WHO standard set by the Board in *Aspirus* and warrants a mail-ballot election.

3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size

On March 12, 2021, Minnesota Governor Tim Walz issued Emergency Executive Order 21-11. Effective March 15, 2021, in relevant part: "Indoor social gatherings are discouraged, but indoor social gatherings up to a maximum of 15 people are permitted as long as participants adhere to the precautions for social gatherings on the Stay Safe Minnesota website."[19] As such, the proposed manual election site does not appear to violate any health orders relating to maximum gathering size.

4. The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols

At hearing and in its brief, the Employer committed to abide by the protocols in GC Memo 20-10.

5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status

In its post-hearing brief, the Employer states that none of its employees at Camp Ripley have tested positive for COVID-19 in the past 14 days. However, it does not indicate whether other entities or individuals work in Building 10-65 or if anyone else accessing Building 10-65 has recently tested positive for COVID-19.

6. Other similarly compelling considerations

The Board specifically explained that the above situations "are not exclusive or exhaustive" and recognized there may be "other similarly compelling considerations" not specifically enumerated in *Aspirus* that may warrant mail balloting. Id., slip op. at 7. I find three such circumstances in the instant case.

First, I find it appropriate to consider recent changes in the pandemic, specifically variants of the original coronavirus (SARS-CoV-2) that causes the disease (COVID-19). The United States Centers for Disease Control and Prevention ("CDC") has identified five "variants of concern" that cause more severe disease, spread more easily between humans, require different treatments, and/or alter the effectiveness of vaccines.[20] All five variants of concern—

[19] "Emergency Executive Order 21-11" (last modified March 12, 2021), pp. 4-5. Office of Governor Tim Walz & Lt. Governor Peggy Flanagan. https://mn.gov/governor/assets/EO%2021-11%20Final_tcm1055-472034.pdf (accessed March 19, 2021).

[20] "SARS-CoV-2 Variants" (updated March 16, 2021). CDC. https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/variant-surveillance/variant-info.html (accessed March 19, 2021). The CDC is also monitoring and evaluating an additional three "variants of interest."

B.1.1.7 ("UK"), B.1.35 ("South Africa"), P.1 ("Brazil"), B.1.427 and B.1.429 (also known as CAL.20C) ("California")—are present in Minnesota,[21] with Minnesota reporting the first Brazil-variant case in the United States.[22] The CDC indicates that it is working to learn more about these variants and is studying them to assess how to control their spread. I find that the uncertainty of added risks with the recently emerging variants, which were not yet identified in the United States at the time of the Board's decision in *Aspirus*, constitute a compelling circumstance that further weighs in favor of a mail-ballot election.

Second, the Employer has failed to provide assurances the National Guard will allow access to Camp Ripley and Building 10-87, where it proposes the manual election should be held. Military facilities generally require approval for visitor access; however, the Employer has not indicated whether such approval is necessary in this case and, if so, what steps are required for approved access. Similarly, it is not known whether Camp Ripley is denying access based on entry point health screenings. Where, as here, the Employer does not control access to the proposed polling place and has not given assurances of access, it is not clear that a manual election could, in fact, be held and weighs in favor of mail balloting.

Third, the unit in this case consists of only two individuals; thus, the inability of a single eligible voter to cast a ballot could affect the results of the election. Since June 29, 2020, all businesses in Minnesota have been required to have a COVID-19 Preparedness Plan.[23] While the Employer did not provide a copy of its plan, Minnesota mandates all plans prevent entrance and immediately send home workers who are potentially infectious, which are defined as people who are experiencing symptoms of or tested positive for COVID-19, reside with someone who is experiencing symptoms of or tested positive for COVID-19, has been in close contact with someone who is experiencing symptoms of or tested positive for COVID-19, or failed the employer's health screening.[24] Unlike pre-pandemic manual elections, where an employee who was feeling ill could still report to work and cast a ballot, Minnesota workers exhibiting symptoms or simply coming in close contact with someone exhibiting symptoms are prevented from exercising their right to vote in a Board-conducted manual election. Under these circumstances, I find that there is a high risk of outcome determinative voter disenfranchisement in a manual election, which is eliminated by use of the Board's mail-ballot procedures.

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[21] See, for example, "COVID-19 Cases Caused by Variants" (updated March 18, 2021). CDC. https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html (accessed March 19, 2021).

[22] "First Identified Cases of SARS-CoV-2 Variant P.1 in the United States — Minnesota, January 2021" (March 12, 2021). *Morbidity and Mortality Weekly Report (MMWR)*. CDC. https://www.cdc.gov/mmwr/volumes/70/wr/mm7010e1.htm (accessed March 19, 2021).

[23] "Emergency Executive Order 20-74" (last modified June 5, 2020). Office of Governor Tim Walz & Lt. Governor Peggy Flanagan. https://mn.gov/governor/assets/EO%2020-74%20Final_tcm1055-437539.pdf (accessed March 19, 2021).

[24] "COVID-19 Preparedness Plan Guidance: Requirements for All Businesses and Other Entities" (March 12, 2021). Minnesota Department of Labor and Industry. http://dli.mn.gov/sites/default/files/pdf/COVID_19_preparedness_plan_requirements_guidelines_businesses.pdf (accessed March 19, 2021).

B. Election Details

I direct that the election be conducted by mail ballot for the reasons set forth above.

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 18, on March 25, 2021, at 4:30 p.m.[25] Voters must sign the outside of the envelope in which the ballot is returned. **Any ballot received in an envelope that is not signed will be automatically void.**

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 18 office by April 1, 2021, in order to arrange for another mail ballot kit to be sent to that employee.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 18, by close of business, 4:30 p.m., on April 14, 2021. The mail ballots will be commingled and counted at the Region 18 office located at 212 Third Avenue South, Suite 200, in Minneapolis, Minnesota at 2:00 p.m. on April 15, 2021.

To ensure the safety of the Board agent and the public, the count shall be conducted virtually. Additional instructions will follow.

C. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **March 12, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

25 The Union waived all ten days of the ten-day voter list period.

D. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **March 23, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

E. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays,

Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Although neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board, all ballots will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: March 19, 2021

/s/ Jennifer A. Hadsall

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